No. 75-1600

In the Supreme Court of the United States

OCTOBER TERM, 1976

MICHAEL G. THEVIS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioner Thevis contends that his sentence to three years' imprisonment for mailing obscene material constitutes cruel and unusual punishment and that the evidence does not show that he knew of the contents of the materials he distributed. All petitioners contend that the materials involved are not obscene.

After a jury trial in the United States District Court for the Northern District of Georgia, petitioners were convicted of mailing obscene materials, in violation of 18 U.S.C. 1461. Petitioner Thevis was convicted on nine counts. He was sentenced to concurrent terms of three years' imprisonment, to run consecutively to a prior sentence of five years' imprisonment, and to fines totalling $45,000. The corporate petitioners were convicted on three counts and fined $5,000 on each count.

The court of appeals affirmed all of the convictions (except for those under one count which charged petitioners Thevis and Book Bin, Inc., with mailing a magazine that the court ruled was not obscene under the applicable standard) (Pet. App. A; 526 F. 2d 989).

The evidence at trial showed that from 1967 through 1969 petitioner Thevis was president of petitioner Pendulum Books, Inc., and was the sole shareholder of that corporation and of petitioner Book Bin, Inc. (G. Exs. 37, 40, 41, 44). The two companies shared offices in Atlanta, Georgia. Through the mail petitioners sent advertisements for and sold certain books and magazines (G. Exs. 20, 22, 25, 28). The magazines (G. Exs. 31, 32) depict nude females with an emphasis on the genitals, and nude or partially nude females and males engaging in a variety of sexual acts, including simulated sadism and masochism. The books (G. Exs. 8, 13, 33) contain repetitive explicit descriptions of a variety of sexual acts.

Experts testified on behalf of the government that the publications have no literary value and appeal to the prurient interest in sex (IV Tr. 546, 556-557, 563, 567). Other experts testified on petitioners' behalf that the materials do not appeal to the prurient interest, that they are not patently offensive, and that they have scientific and medical value (see Brief of Appellants, pp. 8-10).

1. The contention of petitioner Thevis that his sentence constitutes cruel and unusual punishment was properly rejected by the court below. Petitioner had been convicted of obscenity violations at least three times prior to his sentence in the present case. *United States* v. *Thevis*, 490 F. 2d 76 (C.A. 5), certiorari dismissed, 419 U.S. 801; *United States* v. *New Orleans Book Mart, Inc.*, 490 F. 2d 73 (C.A. 5), certiorari dismissed, 419 U.S. 801, certiorari denied, 419 U.S. 1007; *United States* v. *Thevis*,

329 F. Supp. 265 (M.D. Fla.), affirmed, 484 F. 2d 1149 (C.A. 5), certiorari denied, 418 U.S. 932. He was therefore subject under 18 U.S.C. 1461 to a maximum sentence of ten years' imprisonment. The facts underlying all of his convictions show that he was a national distributor of obscene materials. Under these circumstances, the sentence of three years' imprisonment, consecutive to a prior sentence of five years' imprisonment, was neither disproportionate to the offense nor contrary to current standards of decency. Accordingly, petitioner's sentence does not violate the Eighth Amendment. See *Trop* v. *Dulles*, 356 U.S. 86, 100-101 (plurality opinion); *Weems* v. *United States*, 217 U.S. 349, 366-367, 373; *Heath* v. *United States*, 375 F. 2d 521, 523 (C.A.8) (three-year sentence for obscenity violation upheld); *Harris* v. *United States*, 239 F. 2d 612, 615 (C.A. 5) (four-year sentence for obscenity violation upheld).[1]

2. Petitioner Thevis urges that the government failed to prove that he had knowledge of the contents of the materials published and mailed by the corporate petitioners. The court of appeals correctly rejected this argument as follows (Pet. App. A.6-A.7):

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[1]Petitioner Thevis' assertion (Pet. 9-10) that the sentence is cruel and unusual due to uncertainty in the law at the time of his conduct is in the nature of a vagueness argument under the Due Process Clause, which would go to the validity of the conviction rather than the length of the sentence. Petitioner does not, however, appear to say that the law of obscenity was too vague to allow him to conform his conduct accordingly; rather, his argument seems to be that he thought that his conduct was protected under this Court's decision in *Redrup* v. *New York*, 386 U.S. 767. As we point out in the text (p. 4, *infra*), petitioner has misconstrued *Redrup*. In any event, petitioner's mistaken estimate of that decision's import will not support a claim that his sentence was so excessive as to be cruel and unusual.

> [B]ased on the evidence before it, the jury was entitled to infer that [petitioner] Thevis, as president, sole shareholder, and a corporate official directly concerned with the day to day activities of the corporations, was aware of the mail solicitation efforts and of the contents of brochures, magazines and books.

See *Hamling* v. *United States*, 418 U.S. 87, 123-124.

3. Petitioners contend that the materials here are not obscene. Citing *Redrup* v. *New York*, 386 U.S. 767, petitioners assert (Pet. 21) that at the time of their conduct no material could be found constitutionally obscene absent pandering or distribution to minors or unconsenting adults. But *Redrup* did not formulate such a test. Rather, in that case the Court merely articulated the different tests for obscenity that had been adopted by the various Justices, and then found the materials before it to be constitutionally protected under any of those tests. See *Miller* v. *California*, 413 U.S. 15, 22, n. 3. The prevailing rule remained that stated by the plurality in *Memoirs* v. *Massachusetts*, 383 U.S. 413, until it was changed by *Miller* v. *California*, 413 U.S. 15 (see Pet. App. A.7-A.8, n. 6).

In reviewing the challenged materials in this case the court of appeals properly gave petitioners the benefit of both the *Memoirs* and *Miller* standards,[2] and concluded that the materials (with one exception)[3] were obscene (Pet. App. A.8). Petitioners suggest (Pet. 23) that materials cannot be obscene if a "substantial" amount of text accompanies "graphic depiction of sexual acts," but it is the content of the text, not its mere presence, that must be considered in determining whether the material is obscene, and petitioners say nothing about the content of the text accompanying the graphic depictions of sex in the materials at issue here that would cast doubt on the court of appeals' conclusion (Pet. App. A.8) that the materials are "utterly without redeeming social value."[4]

[2]See *Hamling* v. *United States*, *supra*, judging pre-*Miller* conduct under the *Memoirs* test and giving the defendants the benefit, but not the detriment, of the *Miller* standards.

Given the court of appeals' application of both the *Memoirs* and the *Miller* standards, there is no reason to defer disposition of this case pending disposition of *Marks* v. *United States*, No. 75-700, certiorari granted, March 1, 1976, presenting the question whether a defendant in an obscenity prosecution commenced after *Miller* for conduct occurring before that decision is entitled to have the materials at issue judged under the *Memoirs* standards of obscenity.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

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[3]As noted (*supra*, p. 2), the court found one of the magazines not obscene under the *Memoirs* test.

[4]Because the brochures advertised obscene materials, it is unnecessary, as the court below ruled (Pet. App. A.9), to determine the obscenity *vel non* of the brochures themselves under Section 1461. See *Ginzburg* v. *United States*, 383 U.S. 463, 465, n. 4.